TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible] 31

CHARLES CLARENCE HAMILTON, PETITIONER,

vs.

ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED NOVEMBER 11, 1960
CERTIORARI GRANTED JANUARY 9, 1961

Supreme Court of the United States

OCTOBER TERM, 1960

No. 640

CHARLES CLARENCE HAMILTON, PETITIONER,

vs.

ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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[fol. 1]

IN THE SUPREME COURT OF ALABAMA

Sixth Division No. 604

Ex parte:—Charles Clarence Hamilton

Petition for Writ of Error Coram Nobis

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of Alabama

Your Petitioner, Charles Clarence Hamilton, respectfully represents and shows unto this Honorable Court the following facts upon which the Petitioner seeks affirmative relief, to-wit:—

1. On the night of October 12, 1956, or the morning of October 13, 1956, in Ensley, Alabama, petitioner, a Negro, was found in the bedroom of Mrs. Mary Giangrosso, an elderly white woman, by her granddaughter's husband, Mr. Jacob Milko, who held petitioner at gun point, and called the police. [*Hamilton v. State, 116 So. 2d 906*]. Petitioner was arrested, and subsequently indicted by a Grand Jury of Jefferson County, Alabama, on to-wit: November 9, 1956, for burglary in the nighttime with intent to steal, which cause was docketed on November 13, 1956, in the Circuit Court of Jefferson County, Alabama, as State of Alabama vs. Charles Clarence Hamilton, Case No. 98512. [See Exhibit "B" certified copy of Trial Docket Sheet, attached hereto, and made part hereof]. On arraignment, on to-wit: January 4, 1957, the date of arrignment, the Honorable Clell L. Mayfield, a practicing lawyer, with offices in Birmingham, Jefferson County, Alabama, was appointed to defend petitioner and entered a plea of not guilty, and trial was set for January 14, 1957. Trial date was subsequently passed to March 12, 1957, then to March 13, 1957; to April 23, 1957, and finally to April 24, 1957, when the case was nolle prossed on recommendation of the Solicitor. [See Exhibit "B"]

Subsequent to November 9, 1956, and while the above said cause was pending, the Grand Jury of Jefferson

[fol. 2] County, Alabama, on to-wit: February 12, 1957, indicted petition for Burglary with intent to Steal, and Burglary with intent to Ravish [See Exhibit "C"], and the case was subsequently Docketed on to-wit: February 12, 1957, in said court as State of Alabama vs. Charles Clarence Hamilton, No. 98942. On March 1, 1957, petitioner was arraigned in this cause, and entered a plea of not guilty [See Exhibit "C"]. On to-wit: March 4, 1957, the Honorable Clell I. Mayfield was appointed by the Court to defend petitioner [Exhibit "C"].

2. After a trial by Jury, defendant was found guilty of Burglary in the nighttime with intent to ravish and his punishment fixed at death by electrocution. On appeal to this Honorable Court under the automatic appeal statute, the judgment of the trial Court was affirmed. *Hamilton vs. State*, 116 So. 2d 906. Petitioner's application for rehearing was denied on to-wit: January 21, 1960. On the 20th day of May, 1960, petitioner applied to the United States Supreme Court for Writ of Certiorari to this Honorable Court which application was denied on to-wit: June 28, 1960.

The transcript of the record filed in this Honorable Court on above said appeal [*Charles Clarence Hamilton vs. State of Alabama, Sixth Division No. 164*], set out the minute entry on page 1 which recited that petitioner was represented on arraignment by attorney. Petitioner attacked the minute entry on appeal in this Honorable Court and in the United States Supreme Court on Petition for Writ of Certiorari, as being in error, and offered in support thereof, the Judge's minute entry, which recited that the attorney for petitioner was not appointed until March 4, 1957. [*Hamilton v. State, 116 So. 2d, 906*].

3. This Honorable Court held in the above said appeal that although it had no argument with appellant's contention, that in capital cases defendant is entitled to effective counsel from time of arraignment throughout the trial—and that denial of such was a violation of the equal protection and due process clause of the Fourteenth Amendment to the United States Constitution, and Sections 1 and 6 of the Constitution of the State of Alabama, but that the principle was without application to the record before it. The ruling of the Court was sustained in

the opinion of Mr. Chief Justice Livingston, by the principle, supported by numerous cases, that the minute entry of record may not be impeached by the Judge's bench [fol. 3] notes. —[*Hamilton v. State, 116 So. 2d 906*]. Subsequent to the said appeal, petitioner's attorneys, on to-wit: July 19, 1960, were finally able to obtain from the Honorable Clell L. Mayfield, attorney of record on petitioner's trial, an affidavit to the effect that according to his knowledge, information and belief, he was not appointed in case No. 98942 wherein petitioner was tried and convicted for nighttime burglary with intent to ravish, and sentenced to death by electrocution, until March 4, 1957; that he did not represent petitioner on arraignment, nor consult or advise with him. Mr. Mayfield's said affidavit is made a part hereof and attached hereto as Exhibit "A".

4. Petitioner's right to Counsel at the time of arraignment was fundamental. Mr. Mayfield's affidavit attached hereto and made a part hereof clearly proves that the judgment of the court below was a nullity; that petitioner, under the circumstances was denied his right to a fair trial and to due process of law as guaranteed him by the laws and Constitution of the State of Alabama and the Fourteenth Amendment to the Constitution of the United States of America.

Premises Considered, Charles Clarence Hamilton prays that this Honorable Court will enter an order granting to him the right to file a petition in the Circuit Court of Jefferson County, Alabama, for a Writ of Error Coram Nobis to inquire into the facts alleged herein and if the relief prayed for herein is not just, and proper, then, in that event, Charles Clarence Hamilton prays for such other, further, general or special relief as may with the Court seem meet and proper, and as in duty bound petitioner will ever pray.

/s/ Charles Clarence Hamilton
Petitioner

Orzell Billingsley, Jr.

Peter A. Hall
Attorneys for Petitioner
1630-4th Avenue, North
Birmingham, Alabama

[fol. 4] VERIFICATION OMITTED IN PRINTING

CERTIFICATE OF SERVICE OMITTED IN PRINTING

[fol. 5] PETITIONER'S EXHIBIT "A" TO PETITION

STATE OF ALABAMA)
:
JEFFERSON COUNTY)

AFFIDAVIT

Clell I. Mayfield, being an attorney licenses to practice in the State of Alabama, does hereby state that he was the attorney of record for Charles Clarence Hamilton in the Circuit Court of Jefferson County, Alabama, Tenth Judicial Circuit. That he was initially appointed as counsel for the defendant on January 4, 1957, in case number 98512, State of Alabama vs. Charles Clarence Hamilton which case was nolle prossed on April 24, 1957. That prior to April 24, 1957, to-wit: March 4, 1957, the said attorney was appointed as counsel for the defendant in case number 98942, State of Alabama vs. Charles Clarence Hamilton. That said attorney states to the best of his knowledge, information and belief that he was not present at the arraignment of said Charles Clarence Hamilton on March 1, 1957. Said attorney further states that he did not advise or consult with said defendant at the arraignment of March 1, 1957.

/s/ Clell I. Mayfield
CLELL I. MAYFIELD

Personally appeared before me Jefferson D. Boling, a Notary Public for the State of Alabama, Jefferson County, Clell I. Mayfield, who first being sworn states the above facts to be true to the best of his knowledge, information and belief.

Sworn to and subscribed on this the 19th day of July, 1960.

/s/ Jefferson D. Boling
[SEAL] Notary Public

[fol. 6]

PETITIONER'S EXHIBIT "B" TO PETITION

JURY—NON-JURY

THE JUDICIAL CIRCUIT OF ALABAMA

NO. 7851

PARTIES	ACTION	SHERIFF'S RETURN	PLEADINGS FILED	SET FOR HEARING
THE STATE VS. Charles Clarence Hamilton	Ind. BIDH Nightime	Jail 11-9-56		
ATTORNEYS Mayfield	Deason			
CASE DOCKETED Nov 13 1956	ORDERS OF COURT			

1-4-57

The defendant being [illegible] Court and having been duly arraigned pleads not guilty. Case set for trial 1-15-57

W Inzer Judge

RECORDED
Minute Bk. Vol 172 Pg. 17

represent _____ in this case.

_____ Judge.

1-4-57

It appearing to the Court that the defendant is without counsel and unable to employ counsel, Hon. Charles Mayfield is hereby appointed to represent [illegible] in this case.

W Inzer Judge.

RECORDED
Minute Bk. Vol 172 Pg. 17

JAN 15 1957 Ready
FEB 19 1957 passed to
MAR 12 [illegible]

PASSED to file Feb 19, 1957. Judge Inzer
passed to March 12, 1957 W. Inzer

PETITIONER'S EXHIBIT "B"—Continued

FEB 8 - 1957

The defendant in open court [illegible] been previously arraigned, [illegible] for trial

FEB 19

King Judge

RECORDED Minute Bk. Vol. 172 Pg. 276

MAR 12 1957 Passed to Mar. 13 1957. King J.

MAR 13 1957 Read. Passed to April 23, 1957 King J.

APR 23 1957 Read. Passed to April 24-1957 W. Gibson J.

April 24, 1957 Motion granted due to fault in indictment on rec. Dep. Sol. Deason W. Gibson - Judge

RECORDED Minute Bk. Vol. 172 Pg. 286

PETITIONER'S EXHIBIT "C" TO PETITION

JURY---~~NON~~-JURY

10th JUDICIAL CIRCUIT OF ALABAMA

NO. 98942

PARTIES	ACTION	SHERIFF'S RETURN	PLEADINGS FILED	SET FOR HEARING
THE STATE VS. Charles Clarence Hamilton ATTORNEYS Clell D. Mayfield	Ind. BURG WIS BURG W/RAV	Capias Ex 2-12-57 Deceased	5-13-57 Defendant's statement of indigency filed. 5-22-57 Motion filed for new trial 7-26-57	

CASE DOCKETED Feb 12 1957

ORDERS OF COURT

March 1, 1957 Arraigned this date - plea not guilty.

MAR 4-1957

RECORDED
Minute Bk. Vol. 172 Pg. 406
Gil Gibson Judge

It appearing to the Court that the defendant is without counsel and unable to employ counsel, Hon. Clell D. Mayfield is hereby appointed to represent him in this case.

King
Judge

RECORDED
Minute Bk. Vol. 172 Pg. 421

The defendant in open court and [illegible] heretofore arraigned, came also for trial

3/4/57

March 13, 1957.

King Judge

RECORDED
Minute Bk. Vol. 172 Pg. 42[illegible]

MAR 13 1957 Ready. Passed to April 23, 1957. King J.

RECORDED
Minute Bk. Vol. 172 Pg. 472

APR 23 1957 Ready. Jury. Jury Verdict "We the jury find the defendant guilty of Burglary in the first degree as charged in Count 2 of the indictment and fix his punishment at Death. Clarence A. Tolbert, Foreman" Wallace Gibson J.

The defendant being called before the Court for sentence is asked whether he has anything to say as to why sentence should not be pronounced against him says

[fol. 8] (File Endorsement Omitted)

IN THE SUPREME COURT OF ALABAMA,
SIXTH DIVISION

No-164

(Title Omitted)

PETITION FOR STAY OF EXECUTION—Filed July 27, 1960

Comes now the appellant in the above-styled cause, by his attorneys, and petitions the Honorable Court to suspend execution of the sentence heretofore rendered in this case, and to stay execution of the Death Sentence heretofore set for July 29, 1960, and as grounds for said petition appellant shows the Honorable Court the following:—

1. That appellant was tried for and convicted of the crime of First Degree Burglary with the intent to ravish by the Jefferson County, Alabama, Circuit Court on to-wit: the 24th day of April, 1957, and sentenced to be executed in the electric chair.

2. That on appeal, this Honorable Court affirmed the Judgment of the Circuit Court and on to-wit: the 21st day of January, 1960, denied his petition for rehearing.

3. Petitioner's application to the United States Supreme Court for Certiorari was denied on to-wit: June 28, 1960.

4. On appeal in this Honorable Court and in the United States Supreme Court, petitioner citing the judge's bench notes urged, among other things, that he had been denied a fair trial and due process of law as guaranteed him by the statutes and sections 1 and 6 of the Constitution of the State of Alabama, and the Fourteenth Amendment to the Constitution of the United States, in that he had not been represented by counsel on arraignment. Although a pro forma recitation in the record indicated that he had been so represented.

5. On to-wit: July 19, 1960, present attorneys for petitioner were for the first time, able to obtsin an affidavit

from the Honorable Clell I. Mayfield, petitioner's attorney of record on the trial below, to the effect that to the best [fol. 9] of his knowledge, information and belief, he was not appointed to represent petitioner in the cause in which he was convicted and sentenced to death by electrocution, until after his arraignment, and that he did not consult with him or advise him on said arraignment.

The said affidavit is attached to a petition for Writ of Error Coram Nobis to be filed in this Honorable Court. A signed copy is attached hereto and made a part hereof.

Petitioner intends forthwith, to make application to this Honorable Court, for leave to file his petition for Writ of Error Coram Nobis, and that the execution of the Sentence in this cause set for July 29, 1960, should be suspended until this Honorable Court has passed upon this matter.

/s/ Orzell Billingsley, Jr.
Peter A. Hall

Duly Sworn to by Orzell Billingsley, Jr. and Peter A. Hall
(Jurats Omitted in Printing)

[fol. 10] (File Endorsement Omitted)

STATE OF ALABAMA
Office of the Governor

NAME CHARLES CLARENCE HAMILTON

COUNTY JEFFERSON

OFFENSE BURGLARY—1st Degree

CONVICTED APRIL 24, 1957

SENTENCE DEATH—July 29, 1960

EXECUTIVE ORDER GRANTING REPRIEVE—July 28, 1960

It is hereby ordered by me, as Governor, that reprieve be, and it is hereby granted to Charles Clarence Hamilton until Friday, August 19, 1960, at which time, unless otherwise ordered, let the sentence of death be executed.

LET ORDER ISSUE ACCORDINGLY.

/s/ John Patterson
GOVERNOR

No. 5
July 28, 1960

ISSUED
JULY 28, 1960

SECRETARY OF STATE

[fol. 11] (File Endorsement Omitted)

IN THE NAME AND BY THE AUTHORITY
of
THE STATE OF ALABAMA

• • • •

I, JOHN PATTERSON,

GOVERNOR OF THE STATE OF ALABAMA,

• • • •

To all Sheriffs, Keepers of Prisons, Civil Magistrates and others to whom these Presents shall come—
GREETINGS:—

WHEREAS, at the April Term, 1957 of the ..... Court held for the County of Jefferson Charles Clarence Hamilton was convicted of the crime of Burglary—1st Degree and sentenced to Death—July 29, 1960

AND, WHEREAS, for divers good and sufficient reasons it appears to me that the said Charles Clarence Hamilton should be granted a reprieve is a fit subject for Executive Clemency;

Now, Therefore, I, John Patterson, Governor of the State of Alabama, by virtue of the power and authority in me vested by the Constitution and laws of the State of Alabama, do by these presents, order that reprieve be, and it is hereby granted to Charles Clarence Hamilton until Friday, August 19, 1960, at which time, unless otherwise ordered, let the sentence of death be executed.

Witness my hand, and the Great Seal of the State at Office, in the City of Montgomery, this 28 day of July, 1960.

[SEAL.]

/s/ John Patterson,
Governor of Alabama.

By the Govenor:

/s/ Bettye Frink,
Secretary of State.

[fol. 12] (File Endorsement Omitted)

IN THE SUPREME COURT OF ALABAMA

(Title Omitted)

ANSWER TO PETITION FOR WRIT OF ERROR CORAM NOBIS—
Filed August 3, 1960

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of Alabama:—

Comes now The State of Alabama, respondent in the above-styled cause by and through its Attorney General, and in answer to that petition for writ of error coram nobis heretofore filed by Charles Clarence Hamilton, a prisoner under sentence of death, declares the following:—

1. The petition lacks a probability of truth.
2. The petitioner was represented by counsel at the time of his arraignment on March 1, 1957, and such affirmatively appears of record and by exhibits. [See Exhibits A and B attached hereto and made a part hereof].
3. Non-representation of counsel at the time of arraignment is not per se a denial of due process. The petitioner must make some showing or allegation of injury or prejudice to this cause. [See Exhibit C attached hereto and made a part hereof].
4. The petitioner has alleged no showing of prejudice and such affirmatively appears of record.

WHEREFORE The State of Alabama does urge this Honorable Court to deny the petition.

Respectfully submitted,

/s/ MacDonald Gallion
Attorney General

/s/ James W. Webb
Assistant Attorney General

[fol. 13] CERTIFICATE OF SERVICE
OMITTED IN PRINTING

[fol. 14] EXHIBIT A TO ANSWER

STATE OF ALABAMA)
JEFFERSON COUNTY)

CLELL I. MAYFIELD, being an attorney licensed to practice in the State of Alabama, in addition and to further clarify that affidavit given to Orzell Billingsley, Attorney at Law, on the 19th day of July, 1960, does hereby state that he was the attorney appointed by the Circuit Court of Jefferson County, Alabama, Tenth Judicial Circuit, to defend Charles Clarence Hamilton; that he was initially appointed as counsel for the defendant on January 4, 1957, for an indictment of burglary in the nighttime with intent to steal, which case, after several continuances, was nol prossed on April 24, 1957; that prior to April 24, 1957, on March 4, 1957, he was appointed as counsel for the defendant in a second indictment for burglary in the nighttime with intent to ravish; said attorney further states that he knew of the second indictment prior to its being returned by the Grand Jury, that he was aware of the indictment and the arraignment thereon, which occurred on March 1, 1957; that he considered himself as representing the defendant for the second case and that said arraignment on March 1, 1957, was done with his consent although he was not present at the arraignment; that said attorney further states at that particular time he would not have entered any different plea than the plea that was entered by the defendant on March 1, 1957. Said attorney further states that at the time of March 1, 1957, arraignment on said second indictment, he considered the arraignment a mere formality, since the same plea would be entered that had been entered on the first arraignment to the first indictment which occurred on the 4th day of January 1957, and that was his reason for not attending the second arraignment.

Clell I. Mayfield

Sworn to and subscribed before me this 29th day of July, 1960.

Robbie D. White
Notary Public

(SEAL)

[fol. 15] EXHIBIT B TO ANSWER

STATE OF ALABAMA)
JEFFERSON COUNTY)

CECIL M. DEASON, being a Deputy Circuit Solicitor for the Tenth Judicial Circuit of Jefferson County, Alabama, does state that he was the Deputy Circuit Solicitor who presecuted the case against Charles Clarence Hamilton in the Circuit Court of Jefferson County. Mr. Deason further states that he was assigned said case prior to the first arraignment on the first indictment and realized at that time that the defendant would have to re reindicted, since the case was an obvious one of burglary in the nighttime with intent to ravish rather than burglary in the niththtime with intent to steal. Mr. Deason further states that sometime before January 15, 1957, he told Mr. Mayfield that the defendant would have to be reindicted to include a second count on a charge of burglary in the nighttime with intent to ravish; that he further informed Mr. Mayfield that the Grand Jury would meet and would return an indictment containing the two counts and that Mr. Mayfield understood and knew that the case was being continued for the purpose of the Grand Jury returning another indictment and that after the Grand Jury had returned the second indictment, he informed Mr. Mayfield, the attorney representing the defendant, that a new indictment had been returned and that the defendant would be re-arraigned and the case set for trial. Thereafter the defendant was arraigned after Mr. Deason had the conversation with Mr. Mayfield with reference to the new indictment. Mr. Deason further states that on March 1, 1957, at the time of the second arraignment, he informed the court that Mr. Clell I, Mayfield was the attorney representing the defendant and knew that the arraignment was to be held on that date and due to the fact that Mr. Mayfield had been originally appointed by Judge Wheeler on the 4th day of January 1957, wherein the defendant at that time was only charged with burglary in the nighttime with intent to steal and realizing that the first case would be nol porssed after the trial on the second case

and realizing further that the record would have to show in order for Mr. Mayfield to receive his fee from the State of Alabama for representing the defendant, Mr. Deason requested Judge King to let the record reflect the fact that Mr. Mayfield had been formally appointed in the second case so there would be no question about his receiving his fee for representing the defendant and this occurred on March 4, 1957.

Cecil M. Deason

Sworn to and subscribed before me on this 29th day of July, 1960.

Robbie D. White
Notary Public

(SEAL)

16

[fol. 16] Filed Mar. 4, 1960. R. C. Dobson, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 1563-N

EX PARTE WILLIAM K. POWELL

MEMORANDUM OPINION AND JUDGMENT

This cause is now submitted upon the pleadings, the stipulations entered into by and between the parties, the oral testimony taken before the Court and the exhibits to that testimony, and the briefs and arguments of the parties. Upon this submission, this Court now makes the appropriate findings and conclusions, as required by the Rules of Federal Procedure, embodying the same in this memorandum.

The petitioner, William K. Powell, presently in custody of the State of Alabama in this district at Kilby Prison, Montgomery, Alabama, institutes this litigation by filing his petition in this Court, as authorized by §§ 2242 and 2254, Title 28 of the United States Code. Powell, in his petition, sought and was granted a hearing upon his application for writ of habeas corpus; this Court originally denied Powell's petition without a hearing, but later, and in accordance with the mandate of the Supreme Court of the United States, ordered that Powell's application for a hearing be granted. The matter was accordingly set for a full hearing, and a full hearing was held here in Montgomery, commencing at 9:00 a.m., January 19, 1960. Witnesses were subpoenaed and testified for both sides.

The basis for Powell's complaint is that his imprisonment and confinement by the State of Alabama, said imprisonment being for a period of ten years and having been imposed by the Circuit Court of Jefferson County, Alabama, on January 26, 1956, is in violation of his constitutional rights as a citizen, as guaranteed by the laws and by the Constitution of the United States. Specifically,

Powell alleges that his trial and conviction held in the Circuit Court (Tenth Judicial Circuit for the State of Alabama) of Jefferson County, Alabama, wherein he was charged with and convicted of the offense of robbery (Title 14, § 415, 1940 Code of Alabama, as amended), was in violation of his constitutional rights in the following respects:

(1) His conviction and subsequent imprisonment was in violation of due process of law, since the State of Alabama, acting through the Circuit Court of the Tenth Judicial Circuit, refused him his right to plead and be heard upon his plea of "not guilty by reason of insanity." [fol. 17] (2) That he was deprived of due process because he was not represented by counsel at his arraignment on the charges he was tried and convicted of. (This includes his contention that he was not represented by competent counsel.)

(3) That he was deprived of due process because of the failure of the State to have him present or permit him to be present in open court in all stages of the proceedings that resulted in his conviction and imprisonment.

(4) That he was denied a fair and impartial trial by the State of Alabama, which trial resulted in his conviction and imprisonment, by the admission of certain exhibits (gun, bullets, blackjack, gloves and mask) not used in or connected with the alleged offense, and that he was denied the right to present proper and vital testimony and evidence in support of his defense upon the trial of that case.

(5) That he was tried and convicted upon the uncorroborated and perjured testimony of an alleged accomplice.

(6) That he was subject to mental and physical coercion by the State of Alabama police authorities to the extent that he feared and failed to testify in his own defense.

(7) That the State of Alabama, acting through its agents, suppressed vital evidence during the trial resulting in his conviction.

(8) That he was denied a fair and impartial trial, since the Circuit Judge of the Tenth Judicial Circuit that pre-

sided at his trial failed and refused to submit the question of venue to the jury.

(9) That he was deprived of vital and true testimony because of the intimidation and threats made and directed toward certain defense witnesses by the State authorities.

To each of these contentions, separately and severally, the State of Alabama and/or the custodians of William K. Powell plead the general issue. It was understood by all concerned, and reflected by this Court's pre-trial order entered herein on January 7, 1960, that this plea of general issue included a specific denial as to each contention made by Powell and a general denial that the trial and the proceedings leading up to the trial, the conviction and confinement complained of by Powell, were not and are not in violation of any of his constitutional rights, as guaranteed him by the laws and the Constitution of the United States.

In September of 1955, the petitioner, William K. Powell, together with James R. Hatt, was arrested in a rooming house at Leeds, Alabama, by State law enforcement officers, one of whom was B. M. Dinkin of Jefferson County, Alabama. Both of these men were taken into custody, carried to Birmingham, Alabama, and shortly thereafter [fol. 18] indicted for violating Title 14, § 415 of the 1940 Code of Alabama, which section relates to the offense of robbery and provides that upon conviction, punishment shall be, at the discretion of the jury, by death or imprisonment for not less than ten years. In October of 1955, the Honorable L. Drew Redden, a practicing attorney of Birmingham, Alabama, was employed by Powell's family for the limited purpose of securing, if possible, an order of the court providing for a psychiatric examination of William K. Powell. Redden was not employed and did not undertake the general defense of William K. Powell as to the charge of robbery. Such a motion was filed, and the court on October 25, 1955, by consent of the circuit solicitor, ordered that Dr. Frank A. Kay, a specialist in mental diseases, examine Powell and report his findings to the court in writing. It is without dispute that Powell, prior to this time, had been a patient in several mental institutions and had received psychiatric

treatment from several such institutions. Prior to an examination being made by Dr. Kay and on November 23, 1955, Powell was arraigned in open court upon the indictment, and to said indictment entered a plea of not guilty. This Court specifically finds that at the time this plea was entered Powell was not represented by counsel. However, on the same day and during the same court appearance and shortly after Powell entered a formal plea of not guilty, the Circuit Court of Jefferson County, as provided by statute, appointed Robert Collins and Harold Bowron, Jr., two young attorneys of Birmingham, Alabama, to represent Powell in his case. Prior to the time these attorneys were appointed and while Powell was before the court, Powell requested the court, or attempted to request the court, to have an inquisition conducted as to his sanity. Such an inquisition is authorized by the Alabama criminal procedure and is set out in Chapter 21, Title 15 of the 1940 Code of Alabama, as amended. No action (in addition to that already taken) was taken by the court at this time on this request. Mr. Redden, upon learning of Powell's arraignment prior to the psychiatric examination being conducted by Dr. Kay, consulted with attorneys of the office of the circuit solicitor of Jefferson County, Alabama, and the solicitors agreed that the arraignment could be set aside of Powell's court-appointed attorneys for his general defense, Bowron and Collins, decided to take such action. Mr. Redden and the court-appointed attorneys, Bowron and Collins, conferred with Powell, and it was agreed by all concerned that issue would be joined on the plea of not guilty without any attempt being made to enter a formal plea of "not guilty by reason of insanity" and without any attempt being made to pursue the psychiatric examination that had been ordered by the court on October 25, 1955. This [fol. 19] Court further finds that sometime prior to the last of December, 1955, Dr. Kay attempted to perform the psychiatric examination, but Powell refused, and the matter was not pursued any further.

From the time of the arraignment and the appointment of attorneys Bowron and Collins, until the date of the trial commencing on January 25, 1956, this case was con-

tinued twice by order of the court and upon the motion of the circuit solicitor for Jefferson County. In the meantime, the defendant Hatt had employed private counsel, and his case was also continued twice. From the date of their appointment on November 23, 1955, until January 25, 1956, the court-appointed attorneys, Bowron and Collins, both of whom were young and inexperienced, conducted a very thorough and painstaking investigation into both the facts and the law that were applicable in Powell's case. Upon the trial of Powell's case, the co-defendant Hatt testified for the State, and William K. Powell was found guilty, by the jury, of robbery and was sentenced to the penitentiary of the State of Alabama for a term of ten years. The judgment pronuonced thereon was appealed and affirmed by the Alabama Appellate Courts.

As to the contentions now raised by petitioner Powell, this Court specifically finds that Powell was not represented by counsel on November 23, 1955, when he entered his formal plea of not guilty. However, on the same date and at the same court appearance, counsel was appointed for Powell and did effectively represent him from that point on throughout the trial. This Court further specifically finds that Powell was present in open court during all stages of the proceedings that resulted in his trial, conviction and present imprisonment. This Court further specifically finds that Powell was not deprived of any of his constitutional rights as guaranteed by the laws and the Constitution of the United States by the admission of certain exhibits (gun, bullets, blackjack, gloves and mask) which Powell claims were not used in or connected with the offense for which he was convicted in the State court. As a matter of fact, these exhibits were taken from the room Powell and Hatt were in, and were taken incidental to and at the time of their arrest by the State officers. At least part of these articles were of a type used by Powell and Hatt in the robbery for which they were convicted. If there was any error in the admission of this evidence, it was mere error in a point of law and should have been reviewed on the appeal of the matter. It was not such an error as is to be reviewed by

habeas corpus. See *Carruthers* v. *Reed*, 102 F. 2d 933, cert. den. 307 U.S. 643; *Brown* v. *Allen*, 344 U.S. 443; *Adams* v. *United States, etc.*, 317 U.S. 269.

This Court further finds that Powell was not convicted [fol. 20] upon the uncorroborated testimony of his accomplice Hatt; as a matter of fact, there was considerable corroboration of Hatt's testimony. Powell has failed in his attempt to show that Hatt's testimony was perjured, and he has failed in his attempt to show if Hatt did wilfully give any false testimony, that the falsity of same was known by the representatives for the State of Alabama. There is no basis in this case for applying the principle as set out in *Napue* v. *Illinois*, 360 U.S. 264.

As to Powell's contention that he feared and failed to testify in his own behalf during his trial and conviction for robbery, because of mental and physical coercion by the authorities for the State of Alabama, this Court finds that Powell's evidence in this respect completely fails. As his own attorney testified, his real reason for not taking the stand and testifying in his robbery case was his long criminal record. Powell's evidence fails in his attempt to show that the State of Alabama, acting through its agents, suppressed vital evidence and testimony, and also fails in his effort to show that he was deprived of vital testimony because of certain intimidating threats made and directed toward one of his witnesses by the name of Mrs. Annie Lee Hamby, formerly Mrs. L. A. Phillips. As a matter of fact, this witness testified before this Court that the reason she did not testify in the case against Powell, for which he was convicted, is that Deputy Sheriff Dinkin stated to her that Powell was going to get convicted and go to prison and that if the State authorities found out that she was financing Powell's defense and/or living with Powell, her government check would probably be stopped, and that the children would possibly be taken away from her. This Court in face of the denial by Dinkin, a reputable law enforcement officer of many years, cannot believe and accept the testimony of Mrs. Hamby.

In view of the findings by this Court as above set out, many of which are undisputed, the only real problem involved in this case, insofar as the law is concerned, is

that created by the fact that Powell was not represented by counsel at the time of his formal arraignment. The Alabama procedure, as set out in Title 15, § 318 of the 1940 Code of Alabama, provides that when a person is indicted for a capital offense and is without counsel, the court must appoint counsel for him if he is unable to employ counsel. There is no question but that an accused person in a capital case has a constitutional right to be represented by competent counsel. The Supreme Court of the United States left no doubt as to the fact that the Fourteenth Amendment included such a right and precluded an individual being deprived of this right by a state. See *Powell* v. *Alabama*, 1932, 287 U.S. 45. Counsel [fol. 21] now representing this petitioner vigorously contend that *Powell* v. *Alabama*, as above cited, stands for the principle that lack of counsel at arraignment, in and of itself, without any showing of prejudice, is sufficient to violate due process; counsel further vigorously insists that if such principle is not found to be true, then this petitioner was prejudiced by his lack of counsel upon his arraignment. The assignment of counsel to William K. Powell by the Circuit Court of Jefferson County, Alabama—even though it was after his formal plea of not guilty was entered was on the same date that the formal plea was entered and during the same court appearance that formal plea was entered, and was at such a time and under such circumstances as to permit his court-appointed counsel to give him effective aid in the preparation and presentation of his defense. Indeed, effective aid was not only "permitted" but given and received. This Court does not understand that *Powell* v. *Alabama*, supra, stands for the proposition that lack of counsel at arraignment, in and of itself, without some showing of prejudice, necessitates a holding that due process, within the meaning of the Fourteenth Amendment to the Constitution of the United States, was denied. As a matter of fact, that case by strong inference stands for the proposition that if counsel is assigned to an indigent defendant in a capital case at such a time and under such circumstances as to permit counsel to give the defendant effective aid in the preparation and trial of the case, then compliance or non-

compliance with formality is not the determining factor. The real determining factor is whether or not the assignment of counsel was under such circumstances and at such a time that effective aid could be and was available in both the preparation and the presentation of the available defense. Here, counsel were appointed at a time when necessary and before any rights of this petitioner were waived or lost. He was not prejudiced to any extent or degree by counsel being appointed shortly after his formal arraignment, but during the same court appearance. Such delay could "possibly" have been prejudicial to him, but as the Supreme Court of the United States stated in *Darcy* v. *Handy*, 351 U.S. 454:

> "Petitioner has been given ample opportunity to prove that he has been denied due process of law. While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281. See also, *Buchalter* v. *New York*, 319 U.S. 427, 431; *Stroble* v. *California*, 343 U.S. 181, 198. Justice Holmes, speaking for a unanimous Court in *Holt* v. *United States*, [fol. 22] 218 U.S. 245, 251, cautioned that 'If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.'
>
> "We have examined petitioner's allegations, the testimony and documentary evidence in support thereof, and his arguments. We conclude that the most that has been shown is that, in certain respects, opportunity for prejudice existed. From this we are asked to infer that petitioner was prejudiced."

If this Court desired to speculate, it could very readily conclude that "opportunity" for prejudice was afforded in this case. For instance, Powell, before counsel was ap-

pointed, could have entered a plea of guilty instead of a plea of not guilty, and a motion to set such a plea of guilty aside could have been denied. Again, for instance, Powell, through his attorneys, could have attempted to enter the special plea of "not guilty by reason of insanity" and had such a motion denied. See *Morrell* v. *State*, 136 Ala. 44, 34 So. 208, and *Rohn* v. *State*, 186 Ala. 5, 65 So. 42. In either of those instances, the lack of counsel would have been prejudicial to Powell and would not have been a mere nonprejudicial lack of compliance with formality. To be more concise, this Court believes and holds that lack of compliance with formalities in court proceedings, which does not result in prejudice to the defendant, does not in and of itself result in a deprivation of due process within the meaning of the Fourteenth Amendment to the Constitution of the United States.

As to the point petitioner raises that concerns the competency of his court-appointed attorneys (Bowron and Collins), this Court finds that each of these lawyers was a college graduate from an accredited law school, [illegible] admitted to the Alabama Bar and in good standing with that organization. While it is true that neither of these young lawyers had ever defended in a capital criminal case, it is also true that each of them was qualified to do so, and with those qualifications, they diligently applied themselves. Applying the principles of *MacKenna* v. *Ellis*, 1959, 5th Cir., 263 F. 2d 35, cert. den. 360 U.S. 935, and *United States ex rel. Weber* v. *Ragen*, 1949, 7 Cir., 176 F. 2d 579, cert. den. 338 U.S. 809, it must be concluded that Powell's evidence is insufficient as to this point.

As to petitioner's final point, i.e., his constitutional rights were violated because of the trial judge's failure to submit the question of venue to the petit jury, this Court finds that the Circuit Court of Jefferson County had jurisdiction to try, convict and sentence this petitioner. See Title 15, § 94, 1940 Code of Alabama. Also *Odell* v. *Hudspeth*, 189 F. 2d 300, cert. den. 342 U.S. 873. [fol. 23] After a careful study and analysis of all the evidence presented in this case, both oral testimony and written exhibits, this Court is of the firm conviction that the proceedings leading up to and the trial resulting in

the conviction and confinement of William K. Powell by the State of Alabama on January 26, 1956, were fair and in accord with "due process", and without his being deprived of any of his constitutional rights as a citizen as guaranteed by the laws and by the Constitution of the United States.

In accordance with the foregoing and for good cause shown, it is, therefore, the ORDER, JUDGMENT and DECREE of this Court that the petition for writ of habeas corpus, filed herein by William K. Powell, as authorized by [illegible] 2242 and 2254, Title 28, U.S.C.A., and by the mandate of the Supreme Court of the United States, be and the same is hereby denied.

Done, this the 4th day of March, 1960.

/s/ G. Donovan Johnson, Jr.
United States District Judge

[fol. 24]

IN THE
SUPREME COURT OF ALABAMA

SPECIAL TERM 1960

WEDNESDAY—AUGUST 3, 1960

• • • •

ORDER OF SUBMISSION ON BRIEFS ON PETITION AND ANSWER OF THE STATE OF ALABAMA THERETO—Aug. 3, 1960

6 Div. 604

(Title Omitted)

Come the parties by Attorneys, and submit this cause on briefs on the Petition for Leave to file a Petition for Writ of Error Coram Nobis and Answer of the State of Alabama thereto, for decision.

[*Livingston, C. J., Lawson, Stakely and Merrill, JJ., Sitting*]

[fol. 25] IN THE
SUPREME COURT OF THE STATE OF ALABAMA.
JUDICIAL DEPARTMENT

SPECIAL TERM 1960

6 Div. 604

EX PARTE CHARLES CLARENCE HAMILTON
IN RE CHARLES CLARENCE HAMILTON

v.

STATE OF ALABAMA

Petition for Leave to File Writ of Error Coram Nobis

OPINION—Aug. 15, 1960

LAWSON, JUSTICE.

Charles Clarence Hamilton was convicted in the Circuit Court of Jefferson County of the offense of breaking and entering an inhabited dwelling in the nighttime with intent to ravish. — 85, Title 14, Code 1940. We affirmed. [fol. 26] *Hamilton* v. *State* (Ala.), 116 So. 2d 906. Writ of certiorari was denied by the Supreme Court of the United States on June 27, 1960.—*Hamilton* v. *Alabama*, 80 S. Ct. 1638, 4 L. Ed. 2d 1737.

Hamilton has filed in this court a petition for leave to file an application for writ of error coram nobis in the Circuit Court of Jefferson County. Such is the proper procedure in view of the fact that the judgment of the Circuit Court of Jefferson County was affirmed here.—*Taylor* v. *Alabama*, 335 U. S. 252, 68 S. Ct. 1415, 92 L. Ed. 1935; *Ex parte Williams*, 268 Ala. 535, 108 So. 2d 454, and cases cited.

In the petition presently before us, Hamilton asserts that the judgment under which he is being held is void in that his rights under "the laws and Constitution of the State of Alabama and the Fourteenth Amendment to the Constitution of the United States of America" were violated in that he was not represented by counsel at the time he was arraigned and pleaded not guilty to the indictment upon which he was tried and convicted.

The petition, including the exhibits, the affidavit in support of the petition, the State's answer and affidavits supporting it show these circumstances:

Hamilton was first indicted on November 9, 1956. The indictment contained one count which charged burglary of an inhabited dwelling in the nighttime with intent to steal. He was arraigned on that indictment on January 4, 1957. He pleaded not guilty. He was represented by court-appointed counsel at arraignment when the plea was entered.

A second indictment against Hamilton was returned on February 12, 1957. It contained two counts. One count charged burglary of an inhabited dwelling in the [fol. 27] nighttime with intent to steal. The other count charged burglary of an inhabited dwelling in the nighttime with intent to ravish.

Both indictments related to the same incident, that is, to the breaking and entering of the inhabited dwelling of one Jacob C. Milko during the early hours of October 13, 1956.

The lawyer who had been appointed to defend Hamilton against the first indictment was advised by the State's prosecutor that the second indictment had been returned and that Hamilton would be "re-arraigned" and the case set for trial.

Hamilton was arraigned on the second indictment on March 1, 1957. He pleaded not guilty. Neither the lawyer who had been appointed to defend him against the first indictment nor any other lawyer appeared on his behalf at arraignment. The court did not appoint a lawyer to defend him against the second indictment until March 4, 1957, when the same lawyer was appointed who had been appointed to defend him against the first indictment.

Hamilton was brought to trial on the second indictment on April 23, 1957, when a jury found him guilty under the second count of the indictment and inflicted the death penalty. The first indictment was "nolle prossed" on April 24, 1957.

We hold that it is made to appear in this proceeding that Hamilton was not represented by counsel at the time he was arraigned on the indictment on which he was

subsequently tried and convicted. We are not here controlled by the minute and judgment entries, as was the situation on appeal from the judgment of conviction. *Hamilton* v. *State* (Ala.), 116 So. 2d 906.

Section 318, Title 15, Code 1940, as amended, provides in pertinent parts as follows: "When any person indicted for a capital offense is without counsel and the trial judge, after due investigation, is satisfied that the defend- [fol. 28] ant is unable to employ counsel, the court must appoint counsel for him not exceeding two, who must be allowed access to him, if confined, at all reasonable hours, . . ." We think this section places upon the trial court the responsibility of seeing that an accused indicted for a capital offense has a lawyer before he is arraigned and called upon to plead to the indictment. We have found no Alabama case expressly so holding, but this has been the almost uniform practice of the circuit courts of this state for many years and the very purpose of the statute seems to dictate such action.

In *Powell* v. *United States*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, the Supreme Court of the United States held that in a capital case, where the defendant is unable to employ counsel, and is incapable of adequately making his own defense because of ignorance, feeble-mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that such duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. See *Reece* v. *Georgia*, 350 U. S. 85, 76 S. Ct. 167, 100 L. Ed. 77; *Tompkins* v. *Missouri*, 323 U. S. 485, 65 S. Ct. 370, 89 L. Ed. 407.

The right to counsel is not a right confined to representation during a trial on the merits.—*Moore* v. *Michigan*, 355 U. S. 155, 78 S. Ct. 191, 2 L. Ed. 2d 167.

Hamilton should have been represented by counsel at the time of his arraignment. We construe the petition and the papers filed in support and in opposition thereof to show, as we have indicated above, that he was not so represented.

[fol. 29] But does that showing, standing alone, afford prima facie just ground for us to authorize the filing in the lower court of the application for writ of error coram nobis? See *Johnson* v. *Williams*, 244 Ala. 391, 13 So. 2d 683, where we defined the standards to guide us in determining whether a petition for application to file a writ of error coram nobis in the trial court should be granted here. See also *Ex parte Taylor*, 335 U. S. 252, 68 S. Ct. 1415, 92 L. Ed. 1935.

We think not and answer the question in the negative.

In a number of Federal Cases where the defendants were entitled to the benefit of counsel, it has been held that there was no abridgment of the right to counsel where the defendant was arraigned before counsel was appointed to represent him and the defendant pleaded not guilty. Even where the defendant pleaded guilty on arraignment the failure to appoint counsel has been said not to have been prejudicial where counsel was appointed immediately after arraignment and full opportunity was given to withdraw the plea or to take whatever steps were necessary or desirable without regard to what previously transpired.—*Counsel* v. *Cremmer*, 177 F. 2d 22, and cases cited; *Young* v. *United States*, 228 F. 2d 693.

The same rule seems to apply to those states where provision is made for appointment of counsel to represent defendants charged with non-capital offenses.

In *Canizio* v. *New York*, 327 U. S. 82, 66 S. Ct. 452, 90 L. Ed. 545, the Supreme Court of the United States treated the record before it as showing that Canizio was without counsel when he was arraigned and pleaded guilty in a New York court, and that the trial court failed to inform him of his right to counsel, but held that this defect was cured by his being represented by counsel [fol. 30] before and at sentence. It was observed by the court:

> "The attorney could have moved to withdraw the plea of guilty and the County Court of Kings County would have had the power to set aside the plea and let the petitioner stand trial . . . Petitioner's counsel probably thought it undesirable to do so, because this move might have jeopardized his chances for

> securing a low sentence . . . At any rate, whatever the reason petitioner's counsel did not move to withdraw the guilty plea. All of this demonstrated to the satisfaction of the court below even though petitioner may not have had counsel at the beginning, he had counsel in ample time to take advantage of every defense which would have been available to him originally. We think the record shows that petitioner actually had the benefit of counsel. When that counsel took over petitioner's defense, he could have raised the question of a defect in the earlier part of the proceedings. Failing to do so when the statute afforded him the opportunity, we cannot say that the court denied petitioner the right to have a trial with the benefit of counsel." (327 U. S., 85-86)

See *Gayes* v. *New York*, 332 U. S. 145, 67 S. Ct. 1711, 91 L. Ed. 1962; *People* v. *Dolac*, 160 N. Y. S. 2d 911; *Chandler* v. *State*, 226 Ind. 648, 83 N. E. 2d 189; *State* v. *Swenson*, 242 Minn. 570, 65 N. W. 2d 657. Also see *Quicksall* v. *Michigan*, 339 U. S. 660, 70 S. Ct. 910, 94 L. Ed. 1188.

The rule of the cases which we have cited and quoted from above seems to apply to state capital cases as well. [fol. 31] In the opinion in *People* v. *Moore*, 405 Ill. 220, 89 N. E. 2d 731, decided by the Supreme Court of Illinois in 1950, it is shown that Moore was indicted for murder. The opinion does not show that murder was a capital offense in Illinois, but the law of that state so provided. Moore was convicted of murder and was sentenced to serve sixty years in prison. He appealed to the Supreme Court of Illinois, claiming that "his rights under *the statute* and under § I of the fourteenth amendment to the Federal constitution and Sections 2 and 9 of Article II of the Illinois constitution, Smith-Hurd Stats., were violated and because the court did not inquire as to whether he was able to employ counsel and did not appoint counsel to represent him prior to and during his arraignment." (Emphasis supplied) The opinion does not show which provision of law the court had reference to in simply using the words "the statute." However, it seems reasonable to assume that the court was referring to those provisions of the law of Illinois which required the appointment of

counsel to represent defendants charged with capital offenses. In affirming the judgment of conviction, the Illinois Supreme Court said:

> "The indictment consisted of two counts, each charging murder. Plaintiff in error was arraigned May 4, 1934, and was furnished with a copy of the indictment, together with a list of witnesses and jurors, at which time he pleaded not guilty. Three days later he appeared in court with counsel and on his motion the cause was continued. The record shows he was represented by counsel at each stage of the proceedings except at his arraignment when he pleaded not guilty. He was tried by the court after having waived a trial by jury.
>
> [fol. 32] "It will be noted that when plaintiff in error was arraigned he pleaded not guilty, so he was not prejudiced in any way if he did not have counsel at the time. In every other step of the proceedings he was shown to be represented by counsel. We find no error in the record before us and the judgment is accordingly affirmed."

The Supreme Court of the United States declined to review the opinion and judgment of the Supreme Court of Illinois.—*Moore* v. *Illinois*, 339 U.S. 924, 70 S. Ct. 614, 94 L. Ed. 1346.

It appears from the opinion prepared by Judge Barshay for the Kings County Court of New York in the case of *People* v. *Matera*, 132 N.Y.S. 2d 117, that Matera was convicted on June 18, 1931, of the crime of murder in the first degree and was sentenced to death. On his application for executive clemency, the death sentence was commuted to life imprisonment by Governor Franklin D. Roosevelt. Many years later Matera filed his application in the nature of a writ of error coram nobis to vacate and set aside the judgment of conviction. Among the grounds upon which Matera relied was the contention ". . . that on his arraignment on this indictment he was neither represented by counsel nor was he advised of his right of counsel; that he pleaded 'Not Guilty', . . ." Matera's motion or application for writ of error coram

nobis was denied. Such action of the court was based in part on the holding of the Supreme Court of the United States in *Canizio* v. *New York, supra.*

The case in point is that of *State* v. *Sullivan*, decided by the United States Circuit Court of Appeals for the 10th Circuit in 1955.—227 F. 2d 511. The Supreme Court of the United States declined to review the opinion and judgment of the Circuit Court.—350 U. S. 973, 76 S. Ct. 449, 100 L. Ed. 844.

[fol. 33] Verne A. Braasch and Melvin A. Sullivan were tried in a Utah state court upon the charge of murder. They were found guilty and sentenced to death. The judgment was affirmed—*State* v. *Braasch*, 119 Utah 450, 229 P. 2d 389; and certiorari was denied by the Supreme Court of the United States, 342 U. S. 910, 72 S. Ct. 304, 96 L. Ed. 681. Thereafter, they filed in the Supreme Court of Utah a pleading in which they sought a writ of habeas corpus. The writ was disallowed. On the next day Braasch and Sullivan instituted in a United States District Court in the State of Utah a habeas corpus proceeding wherein they alleged that their detention for execution was illegal and void because their rights under the Constitution of the United States had been violated. An amended complaint was subsequently filed. A motion was made to dismiss the habeas corpus proceedings for the reason that the amended complaint contained grounds of attack upon the judgment of the state court which had not been submitted to the state courts of Utah. The United States District Court after a hearing determined that certain grounds of the attack contained in the amended complaint had not been submitted to the state courts and that the submission of such issues to the state courts was an essential preliminary to the right to resort to habeas corpus in the United States court. Instead of dismissing the habeas corpus proceeding, however, the United States District Court retained jurisdiction thereof and gave Braasch and Sulivan time within which to institute in the state court an appropriate proceeding for the determination of such issues.—*Ex parte Sullivan*, 107 F. Supp. 514. A proceeding of habeas corpus was then filed in the Supreme Court of Utah, which was denied.—*Ex parte*

Sullivan, 123 Utah 28, 253 P. 2d 378. Certiorari was [fol. 34] denied by the Supreme Court of the United States.—*Braasch* v. *Utah,* 346 U. S. 861, 74 S. Ct. 75, 98 L. Ed. 373.

Thereafter the United States District Court, having retained jurisdiction of the habeas corpus proceedings, granted the writ of habeas corpus.—*In the Matter of the Application of Sullivan and Braasch,* 126 F. Supp. 564. The United States District Court predicated its action in granting the writ upon multiple grounds, one of which was a failure to furnish the petitioners counsel at the time of their arraignment upon the murder charge.

The State of Utah appealed to the United States Court of Appeals for the 10th Circuit. In an opinion by Judge Bratton reversing the District Court, it was said in part as follows:

> "The trial court rested in part the granting of its writ upon the failure to furnish petitioners counsel at the time of their arraignment upon the criminal charge. Petitioners did not have counsel at the time they were arraigned and entered their pleas of not guilty in the district court. But immediately thereafter, separate counsel were appointed for them, respectively. At no time after the appointment of counsel was any effort made to withdraw such pleas in order to attack the charge, or for any other purpose. And there is a complete failure of any showing that at any juncture of the criminal case were the petitioners denied any substantive or procedural right which might have been available to them except for such pleas. Petitioners did not suffer any proscription or disadvantage at any point in the criminal case [fol. 35] arising out of their pleas of not guilty, entered without the aid of counsel. And, while it is the general rule frequently reiterated that an accused is entitled to the benefit of counsel at every step of the proceedings, where one enters a plea of not guilty and is immediately thereafter furnished counsel for the preparation for trial, for the trial itself, and for the post-trial proceedings, the sentence imposed is not void for violating due process under the Fourteenth

Amendment or for impingement of fundamental rights. Council v. Clemmer, supra [177 F. 2d 22]." (227 F. 2d 511, 514)

As we have indicated, Hamilton seeks our authorization to file an application for writ of error coram nobis in the trial court by simply showing that he was without counsel at time of arraignment. There is no showing or effort to show that Hamilton was disadvantaged in any way by the absence of counsel when he interposed his plea of not guilty. Counsel was appointed for him three days after arraignment whose competence is not questioned and who asserts in an affidavit filed in this proceeding that "he would not have entered any different plea than the plea that was entered by the defendant on March 1, 1957." There is no suggestion that the not guilty plea interposed at the arraignment in absence of counsel prevented the filing of any other plea or motion.

In our opinion written on the appeal from the judgment of conviction (*Hamilton* v. *State* (Ala.), 116 So. 2d 906), we did not intend to convey the impression that we entertained the view that absence of counsel at the time of [fol. 36] arraignment in and of itself would vitiate the judgment of conviction. We simply did not take issue with the assertions made by counsel for Hamilton in that regard because the minute and judgment entries showed that Hamilton was represented by counsel at arraignment.

We are, of course, not unmindful of the severity of the punishment in this case, but we cannot say that a prima facie case for the filing of a petition for writ of error coram nobis has been made. We must, therefore, deny the petition.

PETITION DENIED.

Livingston, C. J., Stakely and Merrill, JJ., concur.

[fol. 37] IN THE
SUPREME COURT OF ALABAMA
SPECIAL TERM 1960

[MONDAY—AUGUST 15th, 1960]

* * * *

ORDER DENYING PETITION FOR LEAVE TO FILE A PETITION FOR WRIT OF ERROR CORAM NOBIS—August 15, 1960

(Title Omitted)

Comes the Petitioner, Charles Clarence Hamilton, by Attorneys, and The State of Alabama by its Attorney General, and the Petition for Leave to File a Petition for Writ of Error Coram Nobis to Jefferson Circuit Court and the Answer of The State of Alabama thereto, being submitted on briefs and duly examined and understood by the Court,

IT IS CONSIDERED AND ORDERED that the Petition be and is hereby denied at the cost of the Petitioner, for which costs let execution issue accordingly.

[*Opinion by Lawson, J.*]

[*Livingston, C. J., Stakely, and Merrill, JJ., concur.*]

[fol. 38] (File Endorsement Omitted)

IN THE SUPREME COURT OF ALABAMA
SIXTH DIVISION—NO. 604

(Title Omitted)

PETITION FOR STAY OF EXECUTION—Filed Aug. 17, 1960

Comes now the appellant in the above-styled cause, by his attorneys, and petitions the Honorable Court to suspend execution of the sentence heretofore rendered in this case, and to stay execution of the Death Sentence heretofore set for August 19, 1960, and as grounds for said petition appellant shows the Honorable Court the following:—

1. That appellant was tried for and convicted of the crime of First Degree Burglary with intent to ravish by the Jefferson County, Alabama, Circuit Court on to-wit: the 24th day of April, 1957, and sentenced to be executed in the electric chair.

2. That on appeal, this Honorable Court affirmed the Judgment of the Circuit Court and on to-wit: the 21st day of January, 1960, denied his petition for rehearing.

3. Petitioner's application to the United States Supreme Court for Certiorari was denied on June 28, 1960, and application for Writ of Error Coram Nobis to the Supreme Court of the State of Alabama, was denied on to-wit: the 15th day of August, 1960.

4. Petitioner has been granted several stays of execution during the several stages of this matter, the last such stay to August 19, 1960, was granted by Honorable John Patterson, Governor of Alabama.

[fol. 39] 5. Petitioner needs a further Stay of Execution in order that he might seek a review of this Honorable Court's decision by the United States Supreme Court by certiorari or appeal.

WHEREFORE, petitioner prays that this Honorable Court will suspend the execution of sentence in this cause set for August 19, 1960, for a reasonable time, in order that he might pursue his remedy in the Federal Courts.

/s/ Orzell Billingsley, Jr.
Peter A. Hall
Attorneys for Petitioner-Appellant

Duly Sworn to by Orzell Billingsley, Jr.
Jurat Omitted in Printing

[fol. 40] IN THE
SUPREME COURT OF ALABAMA
SPECIAL TERM 1960

WEDNESDAY—AUGUST 17, 1960

• • • •

ORDER STAYING DATE OF EXECUTION OF AUGUST 19, 1960, PENDING APPLICATION BY PETITIONER TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI AND RESETTING DATE OF EXECUTION FOR FRIDAY, NOVEMBER 18, 1960—Aug. 17, 1960

(Title Omitted)

WHEREAS, on the 27th day of July, 1960, the Petitioner, Charles Clarence Hamilton, filed a Petition for Leave to File a Petition for Writ of Error Coram Nobis to Jefferson Circuit Court in the Supreme Court of Alabama, and said petition after being duly examined, understood and considered was denied by the Supreme Court of Alabama on August 15, 1960.

WHEREAS, the said Petitioner, Charles Clarence Hamilton, has this day [August 17, 1960] filed a petition in this Court to stay the execution of the death sentence set for Friday, August 19, 1960, by reprieve of Governor John M. Patterson issued July 28, 1960, pending application [fol. 41] by the Petitioner, Charles Clarence Hamilton to the Supreme Court of the United States for a Writ of Certiorari to review the judgment and order of the Supreme Court of Alabama of August 15, 1960.

NOW, THEREFORE, IT IS HEREBY ORDERED by the Supreme Court of Alabama, that the date of execution of the death sentence set for Friday, August 19, 1960, by reprieve of Governor John M. Patterson issued July 28, 1960, be and is hereby stayed, and that the date of execution of the death sentence be and is hereby reset for Friday, November 18, 1960, pending application by the Petitioner, Charles Clarence Hamilton, to the Supreme Court of the United States for a Writ of Certiorari to review the

judgment and order of the Supreme Court of Alabama of August 15, 1960.

[*Livingston, C. J., Lawson, Stakely, and Merrill, JJ., concur.*]

Clerk's Certificate to foregoing Transcript (Omitted in Printing)

[fol. 42] SUPREME COURT OF THE UNITED STATES

No. 533 Misc., October Term, 1960

CHARLES CLARENCE HAMILTON, PETITIONER,

vs.

ALABAMA

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—January 9, 1961

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of Alabama.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 640.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

January 9, 1961

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